ILE COPY

Office-Supreme Court, U.S.
FILED
OCT 20 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959.

No. 59

SAM THOMPSON, - - - - - Petitioner,

versus

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, - Respondents.

On Writ of Certiorari to the Police Court
of the City of Louisville.

BRIEF FOR THE CITY OF LOUISVILLE AND THE COMMONWEALTH OF KENTUCKY.

WILLIAM E. BERRY,
Director of Law,
HERMAN E. FRICK,
Assistant Director of Law,
ROBERT L. DURNING, JR.,
Assistant City Attorney,
Attorneys for Respondents.

JO M. FERGUSON,
Attorney General,
DAVID R. SEBREE,
Assistant Attorney General,
Of Counsel.

October, 1959.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Statutes and Ordinances Involved	2
Questions Presented	2
Statement	3
Summary of Argument	5
Argument:	
I. Petitioner's Convictions Were Supported By the Evidence	6
II. Due Process of Law Does Not Require Appellate Review of Convictions for Petty Misdemeanors	16
III. It Can Not Be Asserted That Kentucky Affords No Redress for Alleged Injuries Arising Out of Non-Appealable Convictions Until the Highest Court of the State Has Been Given the Opportunity to Pass Directly on the Question	19
IV. Frequent Convictions Do Not Transform Arrests Into Reprisals	20
Conclusion	22
Appendix A	23
Appendix B	29

CITATIONS.

Cases:

	PAGE
Akins v. *Texas* (1945), 325 U. S. 398	15
Anderson v. *Buchanan* (1943), 292 Ky. 810, 168 S. W. 2d 48	19
Andrews v. *Swartz* (1895), 156 U. S. 272	16
Barrett v. *Lightfoot* (1824), 17 Ky. (T. B. Monroe) *241, 15 Am. Dec. 110	11
City of Toledo v. *Wagner* (1937), 57 Ohio App. 160, 13 N. E. 2d 136	8
Cobbledick v. *United States* (1940), 309 U. S. 323	16
District of Columbia v. *Clawans* (1937), 300 U. S. 617	17
Elam v. *National Surety Co.* (1923), 201 Ky. 74, 255 S. W. 1039	8
Elmendorf v. *Taylor* (1825), 23 U. S. (10 Wheat) 152	7
Ex Parte Ajuria (1922), 57 Cal. App. 667, 207 P. 515	9
Ex Parte Strittmatter (1910), 58 Tex. Crim. 156, 124 S. W. 906	7
Giannini v. *Garland* (1944), 296 Ky. 361, 177 S. W. 2d 133	10, 15
Ginger v. *Commonwealth* (1953), Ky., 262 S. W. 2d 179	7
Griffin v. *Illinois* (1956), 351 U. S. 12	16
Hoag v. *New Jersey* (1958), 356 U. S. 464	15
King v. *State* (1914), 74 Tex. Crim. 658, 169 S. W. 675	8
Lawrence v. *Hedger*, 3 Taun. 14, 128 Eng. Rep. 6 (C.P. 1810)	8
Lisenba v. *California* (1941), 314 U. S. 219	15
Markham v. *Brown* (1837), 8 N. H. 523, 31 Am. Dec. 209	11
Marron v. *United States* (1927), 275 U. S. 192	9
McKane v. *Durston* (1894), 153 U. S. 684	16

Cases (Cont'd):

	PAGE
Murphy v. *Massachusetts* (1900), 177 U. S. 155	16
New York Trust Co. v. *Eisner* (1921), 256 U. S. 345	18
Nickell v. *Commonwealth* (1955), Ky., 285 S. W. 2d 495	14
People v. *Parker* (1955), 208 Misc. 978, 138 N.Y.S. 2d 2	8
Phillips v. *Municipal Court of Los Angeles* (1938), 24 Cal. App. 2d 453, 75 P. 2d 548	8
Rex v. *Bootie*, 2 Burr. 864, 97 Eng. Rep. 605 (K.B. 1759)	8
Robinson v. *State* (1916), 15 Ala. App. 29, 72 So. 592	8
Shelby v. *Guy* (1826), 24 U. S. (11 Wheat) 361	7
State v. *Starr* (1941), 57 Ariz. 270, 113 P. 2d 356	8
Sternberg v. *Hogg* (1934), 254 Ky. 761, 72 S. W. 2d 421	14
Thompson v. *Wood* (1955), Ky., 277 S. W. 2d 472	20
United States v. *More* (1805), 7 U. S. (3 Cranch) 159	16
United States v. *Walter* (1923), 263 U. S. 15	7
Walters v. *Fowler* (1955), Ky., 280 S. W. 2d 523	20
Wheelhorse's Case, Poph. 208, 79 Eng. Rep. 1297 (K.B. 1628)	8
Williams v. *District of Columbia* (1949), D. C., 65 A. 2d 924	8

Statutes:

28 U.S.C. § 1257(3)	1
Kentucky Constitution, § 110	19
Kentucky Revised Statutes:	
§ 26.010	6
§ 26.080	16
§ 95.150(1)	8
§ 244.080(3)	10
§ 244.120(1)	11

Cases (Cont'd): PAGE

Kentucky Criminal Code:
§ 36(2) 8

General Ordinances of the City of Louisville:
§ 61-25(a) 9
§ 61-46 11
§ 85-12 ..... 2, 6

Miscellaneous:

Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons, 59 Yale L. J. 1351 8
4 Blackstone, Commentaries *280 18

IN THE

Supreme Court of the United States

October Term, 1959.

No. 59

SAM THOMPSON, - - - - - - *Petitioner,*

v.

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, - *Respondents.*

ON WRIT OF CERTIORARI TO THE POLICE COURT OF THE CITY OF LOUISVILLE.

BRIEF FOR THE CITY OF LOUISVILLE AND THE COMMONWEALTH OF KENTUCKY.

OPINIONS BELOW.

The court below issued no opinion, but its judgments are set forth at R. 75-77.

JURISDICTION.

The judgments of the court below (R. 75-77) were entered on February 3, 1959. The petition for a writ of certiorari was filed on May 1, 1959, and granted on June 22, 1959 (R. 81). The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

STATUTES AND ORDINANCES INVOLVED.

The pertinent provisions of the Louisville General Ordinances (§§ 85-8, 85-12, 85-13, 61-25(a), 61-46, 61-55, 67-15, 67-18, 67-39) and of the Kentucky Revised Statutes (§§ 26.010, 26.080, 95.150, 244.080, 244.120) are set forth in the Appendix, *infra*, pp. 23-28.

QUESTIONS PRESENTED.

Section 85-12 of the Louisville General Ordinances provides in relevant part that no person, without *visible* means of support *or* unable to render a *satisfactory* account of himself, shall loaf or loiter "along . . . the public . . . thoroughfares"; nor shall such a person "loaf, or trespass in or about any . . . building" without the owner's consent.

The Louisville Police Court, having exclusive jurisdiction over the enforcement of ordinances, has construed these ordinances (pursuant to the legislative intent to forbid loitering or loafing "along", or at the side of, city streets and walks) to include public places situated at the side of these public ways, such as bus stations, saloons, and parking lots. Such activities on premises which are not "public places," are not forbidden, provided the owner or controller has expressly consented to them.

The questions presented are:

1. Whether the evidence was sufficient to support the convictions, and therefore meets the requirements

of the due process clause of the Fourteenth Amendment.

2. Whether the failure of the state to provide appellate review of constitutional claims arising out of misdemeanor convictions involving fines of less than twenty dollars, violates the due process clause of the Fourteenth Amendment.

3. Whether convictions with small and non-appealable fines deny a person all possibility of effective redress against illegal and arbitrary arrests, and thereby violate the due process clause of the Fourteenth Amendment.

4. (a) Whether in the case before this Court there is sufficient evidence of reprisal for petitioner's insistence on retaining counsel and demanding a hearing.

(b) Whether frequent convictions for misdemeanors involving non-appealable fines must be interpreted as being reprisals for retaining counsel and demanding a hearing in violation of the due process clause of the Fourteenth Amendment.

STATEMENT.

On January 24, 1959, the petitioner was arrested in a public place, a tavern, for violating the loitering ordinance (R. 2) by: (1) loitering or loafing in a public place—a tavern—along a city thoroughfare; and (2) trespassing or loafing, *i. e.*, dancing, in a building without the express consent of the owner or controller, where such dancing was prohibited by law.

Upon being informed of his arrest and the nature of the charge, the petitioner became unruly, resulting in a disorderly conduct charge (R. 3).

Both the loitering charge and the disorderly conduct charge were heard in the Louisville Police Court on February 3, 1959, where the petitioner was found guilty and fined ten dollars on each charge (R. 75-77). The fines were not paid, making it mandatory for him to serve them out at the rate of $2.00 per day; or a total of ten days in jail.

Claiming that his Constitutional rights were violated, with no existing remedy of appeal, the petitioner obtained a stay of the judgments (R. 75-79) and filed a petition for a writ of certiorari to issue from this Court (R. 81).

We believe it only fair to the Court to point out that petitioner's Statement (Pet. Brief, p. 9 through second paragraph, p. 10) concerns two cases, not before it, of a trial on January 20, 1959 (R. 35). All that is properly a part of the record in the cases before this Court is the testimony of Dr. Wynant Dean (R. 34). The remainder of the proceedings were not stipulated. Therefore, neither the first few pages of the Statement, nor pages 31-44 and 47-64 of the Record, are properly before this Court.

SUMMARY OF ARGUMENT.

I.

The findings of the police court that the petitioner had violated both the loitering ordinance and the disorderly conduct ordinance were based on sufficient evidence. There is no merit to the petitioner's contention that there was a complete failure of proof, and that the evidentiary conflicts are not in issue.

Even if it could be successfully argued that the police judge accorded undue weight to the Commonwealth's evidence, rather than to the evidence of petitioner, as to the charge of loitering, the *arrest* on the loitering charge was nevertheless valid and the ensuing disorderly conduct charge is supported by sufficient evidence.

II.

The absence of appellate review in Kentucky, in cases where small fines are levied, is not unique. On the contrary, it is one of the historic facets of Anglo-American law. Until comparatively recent times, there was no appeal from *any* criminal conviction.

III.

It is plainly conjectural to argue that Kentucky affords no redress against arbitrary arrests which result in non-appealable convictions, when that question was never raised below, and the state's highest court has never been given the opportunity to rule on the question.

IV.

There is no merit to petitioner's contention that his arrests were reprisals for retaining counsel and demanding a hearing. The appearance of counsel is the rule, rather than the exception, in cases pending before the Louisville Police Court which are not traffic violations.

ARGUMENT.

I. Petitioner's Convictions Were Supported by the Evidence.

The loitering ordinance, § 85-12 of the Louisville General Ordinances, provides in part (App. A, p. 25):

> "It shall be unlawful for any person or persons, without visible means of support, or who cannot give a satisfactory account of himself, herself, or themselves, to loaf, congregate, or loiter upon, along, in or through the public streets, thoroughfares, or highways of the City of Louisville, or for such person or persons to sleep, lie, loaf, or trespass in or about any premises, building, or other structure in the City of Louisville, without first having obtained the consent of the owner or controller of said premises, structure, or building; . . ."

The Louisville Police Court has exclusive jurisdiction over all offenses arising under the city ordinances. § 26.010 of the Kentucky Revised Statutes (App. A, p. 26). It has construed § 85-12, *supra,* to forbid loitering "along," or at the side of, public thoroughfares, as well

as "upon . . . in or through" public ways. Loitering in public places "along" the thoroughfares, under this construction, falls within the prohibition of the act. In Kentucky, a "combined beer tavern and restaurant is a public place." *Ginger* v. *Commonwealth* (1953), Ky., 262 S. W. 2d 179.

As to loafing on premises which the law does not classify as a "public place," the Police Court has properly construed this section to mean that a person who enters premises for any purpose other than that for which the general public is invited, must obtain the consent of the owner or controller. This consent must be express. One cannot claim the immunity of an implied consent to be on the premises, when he has entered with a surreptitious purpose contrary to that for which the public is invited.

The reason for the foregoing construction is obvious. It covers those situations where loiterers wander off the streets and into parking lots, theater lobbys, saloons, and other public places, with no legitimate purpose at hand. This Court has demonstrated that where the evil sought to be prevented is apparent, a reasonable construction of the language employed is justified. *United States* v. *Walter* (1923), 263 U. S. 15, and such a construction by a state court should be respected. *Elmendorf* v. *Taylor* (1825), 23 U. S. (10 Wheat) 152, 159; *Shelby* v. *Guy* (1826), 24 U. S. (11 Wheat) 361, 367.

The regulation of loitering and vagrancy in public places (including buildings) is a common practice, e. g., *Ex Parte* Strittmatter (1910), 58 Tex. Crim. 156,

124 S. W. 906, 907; *King* v. *State* (1914), 74 Tex. Crim. 658, 169 S. W. 675, 677; *Robinson* v. *State* (1916), 15 Ala. App. 29, 72 So. 592; *Williams* v. *District of Columbia* (1949), D.C., 65 A. 2d 924, 926; and is a valid exercise of the police power. *Phillips* v. *Municipal Court of Los Angeles* (1938), 24 Cal. App. 2d 453, 75 P. 2d 548, 549; *City of Toledo* v. *Wagner* (1937), 57 Ohio App. 160, 13 N. E. 2d 136, 138; *State* v. *Starr* (1941), 57 Ariz. 270, 113 P. 2d 356, 358; *People* v. *Parker* (1955), 208 Misc. 978, 138 N.Y.S. 2d 2, 8, 9; Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 Yale L. J. 1351 (1950).

The Louisville police have "all the common law and statutory powers of constables, . . ." KRS 95.150(1) (App. A, p. 27). § 36(2) of the Kentucky Criminal Code (App. A, p. 28) provides that a peace officer may make an arrest *without a warrant* when a public offense is committed in his presence. Of course, a policeman is a peace officer. *Elam* v. *National Surety Co.* (1923), 201 Ky. 74, 255 S. W. 1039, 1041. Peace officers at common law could arrest without a warrant and in lieu of statute, *inter alia*, to prevent an imminent breach of the peace. In addition, there were a few exceptional cases of misdemeanors for which a peace officer could arrest without a warrant on suspicion largely, as suspicious nightwalkers, streetwalkers, and vagrants. *Wheelhorse's Case*, Poph. 208, 79 Eng. Rep. 1297 (K. B. 1627); *Rex* v. *Bootie*, 2 Burr. 864, 97 Eng. Rep. 605 (K. B. 1759); *Lawrence* v. *Hedger*, 3 Taun. 14, 128 Eng. Rep. 6 (C. P. 1810).

Thus, the police have the power to make arrests for violations of the loitering ordinance anywhere they see such violations taking place. It will not be necessary to argue the authority of the police to make arrests for violations in their presence even if they are *unlawfully on the premises, Ex Parte Ajuria* (1922), 57 Cal. App. 667, 207 P. 515, because in this case, § 61-25(a) of the Louisville General Ordinances (App. A, p. 23) makes the condition that every person licensed by the City to sell alcoholic beverages consents to the entry of the police at all reasonable hours for the purpose of inspection and search. Cf. *Marron* v. *United States* (1927), 275 U. S. 192, 198.

In summary, the police could—and did—arrest the petitioner on either of two grounds:

1. Loitering or loafing in a public place along a public thoroughfare; or

2. Loafing or trespassing in premises (whether or not a public place) without having first obtained the express consent of the owner or controller.

As the evidence clearly shows, the police entered the tavern for the routine inspection (R. 2) authorized by § 61-25(a) of the city ordinances. (App. A, p. 23). They discovered that the petitioner had purchased nothing and had been there for over a half hour (R. 2, 25, 26). The only evidence that petitioner had purchased anything was the testimony of the petitioner himself, and he could not—or would not—even say whether a man or a woman made the sale (R. 19)! The petitioner's reason for being there was to wait for

a bus (R. 2), although he confided at the trial that he didn't know what time the bus was due (R. 23) and demonstrated that fact by testifying that it was due at 7:15, when in fact in was *not* due then (R. 23). Moreover, none of the busses went near the front of the tavern (R. 2) because it is situated on a one-way street going west over which no busses travel, while the petitioner's busses travel east. It was around 6:40 when the officers questioned the petitioner (R. 24). The next bus was not due for nearly an hour, but since the petitioner didn't know what time the bus was due (R. 23)*, he obviously didn't intend to catch a bus.

These facts are strong evidence that the petitioner was in fact loitering or loafing in a public place along a public thoroughfare, and the officers were justified in making this arrest on the basis of the first part of the loitering ordinance alone. *Giannini* v. *Garland* (1944), 296 Ky. 361, 177 S. W. 2d 133, 135.

But notwithstanding this, the petitioner was simultaneously violating another part of the *same* loitering ordinance in that he was trespassing and loafing in a tavern, without *first* having obtained the express consent of the owner or controller.

Section 244.080(3) of the Kentucky Revised Statutes (App. A, p. 28) forbids the sale of alcoholic beverages to anyone convicted of drunkenness three or

---

*"Mr. Lusky: The record will show I was the one that said 7:30.

Mr. Dougherty: He said 7:15.

The Witness: Well, I didn't have a watch on and I didn't know the time.

Q. You didn't know what time the bus was due?

A. Yes."

more times within the past twelve months. § 244.120(1) (App. A, p. 28) forbids alcoholic beverage licenses to permit "people of ill repute to congregate on the premises." § 61-46 of the Louisville General Ordinances (App. A, p. 23) forbids dancing in any place where alcoholic beverages are sold (excepting hotels).

At the time the petitioner entered the saloon, he had been convicted of being drunk in a public place eight times within the year preceding January 24, 1959 (App. B, p. 29). From a legal standpoint, his presence was an anathema to any person licensed to sell alcoholic beverages. It would have been a violation of the alcoholic beverage laws to sell the petitioner a drink, and the manager in fact testified that he had sold him nothing (R. 26), nor had he seen him eat anything (R. 28). Thus the petitioner's actions clearly indicated a trespass *ab initio*. *Barrett* v. *Lightfoot* (1824), 17 Ky. (1 T. B. Monroe) *241, 15 Am. Dec. 110; cf. *Markham* v. *Brown* (1837), 8 N. H. 523, 31 Am. Dec. 209. He abused his original entry by wrongful actions which placed a valuable right of the owner in jeopardy, and this without even purchasing anything there (R. 2, 25, 26). This was a trespass.

The petitioner argues that the absent owner (R. 29) impliedly consented to his presence. It has already been shown (p. 7) that implied consent is not a sufficient defense to a violation of the loitering ordinance as construed by the court. But even if implied consent were sufficient, the petitioner did not have it. The rule of implication works both ways, and little demonstration is necessary to show that the owner did not im-

pliedly consent to the presence of one who placed his city and state alcoholic beverage licenses in jeopardy on three separate counts.

The owner of the tavern consented to the entry of the general public only for the purpose of making purchases. This was a business—not a place for dancing auditions. The petitioner had been in the tavern for over a half hour, had purchased nothing—except by his own testimony, and was dancing when the officers entered. He had not *first* obtained the consent of the controller to do these things without buying something, and the controller in fact testified that he didn't want the petitioner to dance there (R. 27). It is obvious that the petitioner was violating either of two parts of the loitering ordinance and the police were authorized to make the arrest.

The foregoing evidence having established that the petitioner was loitering within the meaning of the ordinance, the further consideration arises whether at the time of his arrest petitioner:

(1) Had *visible* means of support, or, alternatively,

(2) Was unable to give a *satisfactory* account of himself.

Many who have seen the petitioner agree that he has no *visible* means of support. He testified that he works only one day a week (R. 17), and he *appears* to have no financial responsibility whatever. Unlike the vagrancy statute, the loitering ordinance does not make proof of means of support a defense to a charge of loitering.

The fact that a person has no *visible* means of support is an element of loitering. [It was this distinction which the prosecutor had in mind when he emphasized that this was a charge of loitering—not vagrancy (R. 16).]

Alternatively, at the time of his arrest the petitioner was unable to give a satisfactory account of himself. Certainly the arresting officer, Mr. Lacefield, so believed and apparently the police judge likewise so believed. That this is a reasonable attitude on the part of both the arresting officer and the police judge in the light of the evidence can easily be established if the Court would place themselves in the position of the arresting officer at the time and place of the arrest. Consider these facts which confronted Mr. Lacefield *at the time of the arrest*:

The police officers entered a tavern on a routine check as specified by local ordinance as a condition to enforcing propriety and order on premises licensed to sell liquor. That same ordinance of the City forbids dancing on any licensed premises other than hotels. This tavern was not of such a nature. When the police officers entered these premises, which are open to the public for the purpose of selling food and alcoholic beverages to the public, and for no other purpose, they found the petitioner dancing by himself in the middle of the floor, neither eating nor drinking. When queried by the arresting officer as to what he was doing on these premises, he did not answer that he was waiting to be served food or drink, or any other reason associated with the business purpose of the

premises but said that he was waiting for a bus! These premises face upon a one-way street going west, whereas any bus which the petitioner would catch to return to his home would be going east on a one-way street approximately one block from the entrance to the tavern.

Certainly no reasonable man can say that the petitioner gave a satisfactory account of himself.

As to the disorderly conduct charge (App. A, p. 25), the petitioner contends that a person must always argue back and forth with the arresting officer (Pet. Brief, p. 19), otherwise, this will be a waiver of his right to question the validtiy of the arrest. Two cases are cited (Pet. Brief, pp. 19-20): *Nickell* v. *Commonwealth* (1955), Ky., 285 S. W. 2d 495, and *Sternberg* v. *Hogg* (1934), 254 Ky. 761, 72 S. W. 2d 421. In the *Sternberg* case, *supra,* the question was whether or not the arresting officer informed the accused of his intention to arrest him. In the *Nickell* case, *supra,* the Court said at 285 S. W. 2d 496:

> "The provision [§ 39 of the Criminal Code] has always been construed as requiring only a substantial compliance, and notwithstanding the absence of qualification, as not requiring its observance where it is impractical or futile, as where the person about to be arrested knows of the officer's intention or purpose or when he resists arrest or when the officer has no reasonable opportunity to inform him."

The police informed the petitioner of their intention to arrest him and the nature of the charge (R. 2, 25). Arguing back and forth (R. 3) was uncalled for. The evidence plainly supports the disorderly conduct charge.

Moreover, the highest court of Kentucky has held that "it has long been the rule that a peace officer who arrests one for being . . . disorderly in his presence is not liable in an action for false arrest and imprisonment if . . . he had reasonable grounds to believe and did believe in good faith, that the person arrested was . . . disorderly in his presence." *Giannini* v. *Garland* (1944), 296 Ky. 361, 177 S. W. 2d 133, 136.

There was evidence to support the offenses charged. Granted that there was also conflicting evidence, no Constitutional restriction prevents a judge from resolving such conflicts favorably to the Commonwealth.

This Court has reiterated that while it will examine the record of a state court in criminal cases involving a claimed denial of Constitutional rights, it will not overrule the state court on the propriety of admitting evidence "shocking to the sensibilities," as a denial of due process, *Lisenba* v. *California* (1941), 314 U. S. 219, 228, nor will the Court overrule a state court on fairly debatable factual issues. *Hoag* v. *New Jersey* (1958), 356 U. S. 464, 471. Respect for the conclusion of the state judiciary compels the acceptance of the conclusion of the trier on disputed issues unless it is so *lacking* in support as to violate due process. *Akins* v. *Texas* (1945), 325 U. S. 398, 402. It

cannot be denied that the facts in this case, both for and against conviction, are "fairly debatable."

II. Due Process of Law Does Not Require Appellate Review of Convictions for Petty Misdemeanors.

It requires little citation of authority to assert that "due process of law does not require a State to afford review of criminal judgments." *Griffin* v. *Illinois* (1956), 351 U. S. 12, 21.

> "A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow such a review. A citation of authorities upon the point is unnecessary." *McKane* v. *Durston* (1894), 153 U. S. 684, 687; *Andrews* v. *Swartz* (1895), 156 U. S. 272, 275; *Murphy* v. *Massachusetts* (1900), 177 U. S. 155, 158.

It has long been recognized that the right to appellate review is a matter of legislative grace. *United States* v. *More* (1805), 7 U. S. (3 Cranch) 159, 171, 173; *Cobbledick* v. *United States* (1940), 309 U. S. 323, 325.

But notwithstanding, Kentucky *does* grant an appeal as a matter of right in all cases before the Louisville Police Court where a fine of twenty dollars or more, or imprisonment of more than ten days, is imposed. § 26.080 (1) and (3), Kentucky Revised Statutes (App. A, p. 27). This is certainly a reason-

able line of demarcation. Chaos would result from allowing a review of every infinitesimal penalty imposed by the police court. The court handles more than 25,000 cases each year. One can barely visualize the appellate dockets with more than 25,000 cases added to the multitude of original actions which are filed direct in those higher courts. The utopian system necessary to handle so many additional appeals would entail prodigious expense. To attempt the handling of such an increase under the present system would indeed result in a "leaden footed" judicial administration.

It is further suggested that a jury trial should be made available in cases involving fines of less than one hundred dollars, or fifty days' imprisonment (Pet. Brief, pp. 39-41). While this proposal also is ideal, it too ignores realities.

Summary trials for petty offenses are indigenous to the common law and their Constitutionality has been consistently upheld:

> "In the fact of this history, we find it impossible to say that a ninety day penalty for a petty offense, meted out upon a trial without a jury, does not conform to standards which prevailed when the Constitution was adopted, or was not then contemplated as appropriate notwithstanding the Constitutional guaranty of a jury trial. This conclusion is unaffected by the fact that respondent is not entitled to an appeal as of right. . . ." *District of Columbia* v. *Clawans* (1937), 300 U. S. 617, 627.

The reasons for the existence of summary trials for petty offenses still include those put forth by Blackstone, 4 Blackstone, Commentaries *280:

> ". . . for the greater ease of the subject by doing him speedy justice, and by not harassing the freeholders with frequent and troublesome attendances to try every minute offense."

Speedy justice in such cases is advantageous not only to the defendant, but to the city and state as well. The jails would be packed with individuals charged with minor offenses, unable to make bail, boarding at public expense while awaiting a trial. Moreover, the burden to the citizen who must serve as a juror at these frequent hearings would be unbearable. Civic duty constitutes only one of the myriad demands for a prospective juror's limited time.

Unfortunately, theoretical ideals do conflict with practical realities. Providing appellate reviews and jury trials for every petty offense is just such an instance. It therefore becomes simply a matter of expediency. Of course, expediency should not be permitted to result in great injustice, but in the case of a petty offense with a small punishment, the injustice is not great. It may exist, but the defendant can not be greatly injured. "Upon this point a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner* (1921), 256 U. S. 345, 349.

III. It Can Not Be Asserted That Kentucky Affords No Redress for Alleged Injuries Arising Out of Non-Appealable Convictions Until the Highest Court of the State Has Been Given the Opportunity to Pass Directly on the Question.

We believe it manifestly incorrect to argue the existence or non-existence of a civil or criminal remedy to vindicate alleged injustices arising out of non-appealable fines. This question was never submitted to the court below, nor has the highest court of Kentucky been afforded the opportunity to study the situation by a consideration of briefs and arguments. This case was never before the Kentucky Court of Appeals. The only question which the court considered was the propriety of the Circuit Court's staying the judgment of the Louisville Police Court by a writ of habeas corpus. Because no basis in Kentucky decision law exists for the petitioner's premise, it should be ignored. The Kentucky Court of Appeals has previously stated:

> "The arm of justice in Kentucky ought not to be any weaker or shorter than it is in the Federal courts. Our State Constitution also insures every person a 'remedy by due course of law' for an injury done him in his person. Sec. 14. And we have already recognized that the writ of coram nobis is a part of our 'due course of law.'" *Anderson* v. *Buchanan* (1943), 292 Ky. 810, 168 S. W. 2d 48, 52.

Section 110 of the Kentucky Constitution (App. A, p. 28) provides:

> "The Court of Appeals . . . shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions."

The Kentucky Court of Appeals has held that small fines alone do not constitute irreparable injury. *Thompson* v. *Wood* (1955), Ky., 277 S. W. 2d 472, 474; *Walters* v. *Fowler* (1955), Ky., 280 S. W. 2d 523, 524. However, the court implied that if a great and irreparable injury would be done, the Court of Appeals would assume jurisdiction under § 110 of the Kentucky Constitution. *Thompson* v. *Wood, supra,* at 474. Where, as here, there is financial inability to pay, as well as the other circumstances alleged, creating such a great and irreparable injury, the Court of Appeals probably would take jurisdiction. Certainly that court never has been confronted with this situation, and should be given an opportunity to consider whether petitioner is suffering a great and irreparable injury.

IV. Frequent Convictions Do Not Transform Arrests Into Reprisals.

An attempt was made to establish whether or not the police were familiar with the past record of the petitioner (R. 11). The purpose now appears to be the establishment of a premise (Pet. Brief, p. 57) that any subsequent arrests are "reprisals." Non sequitur.

Whether or not the police knew of the petitioner's record is immaterial so long as the elements of an offense exists to justify the arrest.

But it should be emphasized that past experience is, for the law enforcement officer, an indispensable aid for evaluating the actions of certain individuals who are frequent violaters. Loitering, vagrancy, and "suspicious persons" laws are somewhat anomalous categories. They are not susceptible to the same tangible modes of proof that disclose most offenses.

The purpose of such laws, particularly in municipal areas, is obvious. Yet they would play a worthless role in preserving the safety and welfare if police officers must turn their heads to await only the most pronounced evidence, for such proof is not common to these offenses. Of course, the power to arrest on such grounds should be used with great care.

But one characteristic common to such offenses is that they arise more from a course of conduct or a manner of life than from an isolated act. Granted that any person can make himself appear exceedingly suspicious or idle at a given time, yet the vast majority of such cases involve recidivists. While such experience is not a license to arrest past offenders, it can hardly be discounted by a conscientious policeman. Many major crimes have been nipped in the bud by such vigilance.

There is no meritorious basis for petitioner's claim of reprisals. This argument should be summarily dismissed.

CONCLUSION.

For the reasons stated it is respectfully submitted that both of the judgments of the Louisville Police Court, entered February 3, 1959, should be affirmed.

WILLIAM E. BERRY,
Director of Law,.

HERMAN E. FRICK,
Assistant Director of Law,

ROBERT L. DURNING, JR.,
Assistant City Attorney,
Attorneys for City of Louisville.

JO M. FERGUSON,
Attorney General,

DAVID B. SEBREE,
Assistant Attorney General,
Of Counsel.

October, 1959.